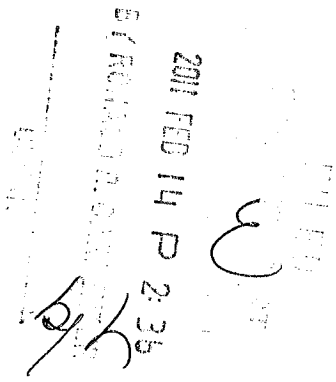

NO. 84148-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROGER SCHERNER,

Petitioner.

BRIEF OF AMICUS CURIAE
KING COUNTY SEXUAL ASSAULT RESOURCE CENTER

Laura Jones, WSBA No. 40554
King County Sexual Assault Resource Center
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A. IDENTITY AND INTEREST OF AMICUS

The King County Sexual Assault Resource Center ("KCSARC") is a non-profit organization that serves victims of sexual assault and their families. As the main provider of legal advocacy services in King County, we assist over 1,000 victims of sexual assault each year through the criminal justice process. Our services also include a 24-hour resource line, therapy, parent education, and prevention education. In 2010, KCSARC served 2,757 clients.

Through working with victims over the past 35 years that our agency has been in existence, we recognize some of the unique difficulties in prosecuting sexual assault crimes. KCSARC is greatly interested in the outcome of this case as it may significantly impact the law governing admissible evidence in sex offense cases, and thus, our clients.

B. ISSUE

Whether the Court should reject Mr. Scherner's argument that RCW 10.58.090 violates the equal protection clause.

C. ARGUMENT

THE COURT SHOULD REJECT MR. SCHERNER'S EQUAL PROTECTION CHALLENGE TO RCW 10.58.090 BECAUSE IT PASSES RATIONAL BASIS SCRUTINY.

Petitioner Roger Scherner argues that RCW 10.58.090 violates the equal protection clause because it unjustly discriminates between similarly situated persons. Petition for Review at 10-12. This Court should reject his claim. The statute passes the rational basis test because it promotes effective prosecution of sex offenses.

Both the federal and Washington state constitutions require the same treatment of people who are similarly situated. U.S. Const. amend. XIV, § 12; Wash. Const., art. I, § 12. The court construes the federal and state equal protection clauses identically. *State v. King*, 149 Wn. App. 96, 102, 202 P.3d 351 (2009) (citing *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996)).

In order to prevail on an equal protection challenge, the petitioner must prove that he was treated differently because of his membership in a class of similarly situated people, and that the disparate treatment was the result of intentional discrimination. *State v. Osman*, 157 Wn.2d 474, 486, 139 P.3d 334 (2006). As in this case, when a classification does not involve a suspect class or threaten a fundamental right, the rational basis

test is applied to determine whether a statute complies with the equal protection clause. *Id.*

In order for a law to pass the rational basis test, the following conditions must be met: 1) the classification must apply equally to all class members; 2) there must be a rational basis to distinguish class members from non-members; and 3) the classification must have a rational relationship to the legislative purpose. *State v. Smith,* 117 Wn.2d 263, 279, 814 P.2d 652 (1991). In order to overcome a strong presumption that the law is constitutional, the classification must be "purely arbitrary." *American Network, Inc. v. Utilities & Transp. Comm'n*, 113 Wn.2d 59, 82, 776 P.2d 950 (1989) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 55 L. Ed. 369 (1911)).

In the present case, Mr. Scherner's assertion that RCW 10.58.090 violates equal protection fails because the statute passes the rational basis test.

a. *The classification applies equally to all defendants charged with sex offenses.*

Here, the first factor is met because the statute applies equally to all defendants charged with a sex offense. RCW 10.58.090. The fact that RCW 10.58.090 distinguishes persons charged with sex offenses from other criminal defendants is immaterial: "Where persons of different

classes are treated differently, there is no equal protection violation." *Forbes v. Seattle,* 113 Wn.2d 929, 943, 785 P.2d 431 (1990). Moreover, the court has found that similar classifications of defendants based on the type of crime do not violate equal protection. *See e.g. State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996) (the court upheld a classification of defendants who had committed a "most serious offense").

b. *There is a rational basis to distinguish defendants accused of sex offenses from other defendants due to the unique nature of these types of crimes.*

The second factor is also met in this case as there is a rational basis to distinguish between defendants accused of sex offenses and other defendants. *See State v. Ward*, 123 Wn.2d 488, 516-17, 869 P.2d 1062 (1994). A legitimate state interest in classifying defendants accused of sex offenses exists because 1) these crimes have particularly harmful effects on victims, 2) sexual assault is highly prevalent, and 3) there is a lack of physical evidence in many of these cases.

First, and as the Washington State legislature has acknowledged, the effects of sexual assault are devastating:

> Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims.

RCW 7.90.005. Long term, victims can suffer from posttraumatic stress disorder, behavior problems, sexualized behaviors, and poor self-esteem. Kathleen A. Kendall-Tackett, et. al., *Impact of Child Sexual Abuse: A Review and Synthesis of Recent Empirical Studies,* 113 Psychological Bulletin 164-180 (1993). According to one study, 40% of victims of child sexual abuse had trauma that was serious enough to require counseling during adulthood. A. Brown & D. Finkelhor, *Impact of Child Sexual Abuse: A Review of the Literature*, 99 Psychological Bulletin 66-77 (1986). Simply put, "[l]ike scar tissue, the effects of sexual abuse never go away." Kathleen Megan, *The Effects of Sexual Abuse*, Hartford Courant, February 23, 1997.

A victim of sexual assault experiences more damaging psychological trauma when assaulted by someone she or he knows than do victims of other crimes. J.R. Conte & J.R. Schuerman, *Factors associated with an increased impact of child sexual abuse*, 13 Child Abuse and Neglect 201-211 (1987). This is significant, as most sexual assaults and rapes are committed by someone known to the victim. Two-thirds of victims ages 18-29 had a prior relationship with the offender. Lawrence A. Greenfeld, U.S. Department of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault (1997), http://www.mincava.umn.edu/documents/sexoff/sexoff.pdf. In

child sexual abuse cases, 75-80% of the abuse is committed by parents, step-relatives, family friends, neighbors or authority figures. D. Finkelhor, Sexually Victimized Children 3, 87 (The Free Press 1981) (1979).; D.E.H. Russell, *The incidence and prevalence of intrafamilial and extrafamilial sexual abuse of female children*, 7 Child Abuse and Neglect 133-146 (1983).

Sex offenses are also highly prevalent. According to the Centers for Disease Control and Prevention, between fifteen and twenty-five percent of women have experienced an attempted or completed rape at some time in their lives, and more than half of those women report being raped before age 18. Centers for Disease Control and Prevention, Injury fact sheet (2002), http://www.cdc.gov/ncipc/anniversary/media/fs_int.htm. Other authorities estimate that one in three girls and one in six boys are sexually abused by age 18. Ann S. Botash, M.D., *Examination for sexual abuse in prepubertal children: an update*, 26(5) Pediatr. Ann. 312-20 (1997). In a study of non-incarcerated sex offenders, 126 men admitted that they had committed a total of 907 rapes involving 882 women, with an average of seven different victims per rapist. G. Abel et. al., *Self-reported sex crime of nonincarcerated paraphiliacs*, 2(1) J. Interpersonal Violence 3-25 (1987).

Finally, as in this case, sex offenses must usually be proven without corroboration or physical evidence. If the court had not allowed evidence of Mr. Scherner's prior sexual assaults under RCW 10.58.090, the only evidence that the abuse had occurred would have been the victim's testimony.

Physical injury is not an inevitable consequence of rape, P.S. Cartwright, *Factors that correlate with injury sustained by survivors of sexual assault*, 70 Obstet. Gynecol. 44-46 (1989), and victims often do not immediately (or ever) report the crime. According to a survey conducted by the U.S. Department of Justice, from 1993 to 1999, 51.9% - 70.2% of rape/sexual assault crimes were not reported to law enforcement each year. Callie M. Rennison, U.S. Department of Justice, Bureau of Justice Statistics, NCJ 187007, National Crime Victimization Survey, Criminal Victimization 2000: Changes 1999-2000 with Trends 1993-2000 (2001), http://bjs.ojp.usdoj.gov/content/pub/pdf/cv00.pdf.

There are many reasons why a sexual assault victim may not immediately report the assault to law enforcement including: fear of the stigma attached to rape victims, fear of retaliation by the offender, lack of encouragement to talk about the abuse, fear that the offender will not be held accountable, or shock. R. Acierno et. al., *Prevalence rates: case*

identification and risk factors for sexual assault, physical assault, and domestic violence in men and women, 23(2) Behav. Med., 53-64 (1997).

DNA evidence must be collected shortly after the crime is committed, usually within 72 hours. The National Center for Victims of Crime, DNA & Crime Victims: What Victim Assistance Professionals Need to Know, http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=45243. Because there is a short window in which DNA evidence can be collected, delayed reporting decreases the likelihood that forensic evidence can be collected during the investigation. Given the lack of such physical evidence in most sexual assault cases, fact-finders are often left only to weigh the credibility of the victim against the defendant.

Not surprisingly, other courts considering equal protection challenges to statutes or rules similar to RCW 10.58.090 have uniformly rejected them. *United States v. Julian*, 427 F.3d 471, 487 (7th Cir. 2005); *United States v. Mound*, 149 F.3d 799, 801 (8th Cir.1998); *United State v. LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001); *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir.1998); *United States v. Enjady*, 134 F.3d 1427, 1433-34 (10th Cir.1998); *People v. Donoho*, 204 Ill.2d 159, 176-78, 788 N.E.2d 707 (2003); *Horn v. State*, 204 P.3d 777, 784-86 (Okla. Crim. App. 2009). As the Seventh Circuit observed:

> Congress enacted Rule 413 because sexual assault cases, especially cases involving victims who are juveniles, often raise unique questions regarding the credibility of the victims which render a defendant's prior conduct especially probative. *[Citation omitted]* Its reasoning in this regard cannot be described as irrational.

Julian, 427 F.3d at 487.

c. *The classification created by RCW 10.58.090 has a rational relationship with the legislative purpose of protecting the public.*

The third prong of the rational basis test is also met in this case, as the court has found that "the Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest." *State v. Brayman*, 110 Wn.2d 183, 193, 751 P.2d 294 (1988). For example, in a case where the statute classified defendants based on their commission of a "most serious offense," this Court found that such a classification did not violate equal protection:

> And while the offenses included in the enumerated list of crimes in RCW 9.94A.030(21) may at least be debatable, they nevertheless comprise an arguably rational, and not arbitrary, attempt to define a particular group of recidivists who pose a significant threat to the legitimate state goal of public safety.

State v. Manussier, 129 Wn.2d at 674, 921 P.2d 473.

Similarly, RCW 10.58.090 also promotes public safety. In passing this statute, the Washington State Legislature recognized that in order for fact finders to reach a fair verdict, there is a strong public interest in

allowing them to consider evidence about a defendant's prior sex offenses. Laws of 2008, ch. 90, § 1. Given the unique considerations in these types of cases as discussed in the preceding section, RCW 10.58.090 helps finders of fact more effectively evaluate the credibility of witness testimony.

D. CONCLUSION

Sex offenses are different than other crimes: there are long-lasting harmful effects on victims, they are highly prevalent, and there is often a lack of physical evidence. Due to these unique considerations, as well as a strong public interest that fact finders reach fair verdicts, the application of RCW 10.58.090 does not violate equal protection.

Therefore, KCSARC respectfully asks the Court to uphold RCW 10.58.090, and to affirm Mr. Scherner's convictions of Child Molestation in the First Degree.

Respectfully submitted this 2nd day of February, 2011,

By: _____

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Certificate of Service by Mail

I, Today I deposited in the mail of the United States of America, with postage prepaid, properly stamped and addressed envelopes directed to the following:

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containing copies of the MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and the BRIEF OF AMICUS CURIAE, in STATE V. SCHERNER, Cause No. 84148-9, in the Washington Supreme Court.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Laura K. Jones, WSBA No. 40554
Done in Renton, Washington

Date 2/2/11